

BEFORE

THE PUBLIC SERVICE COMMISSION OF

SOUTH CAROLINA

DOCKET NOS. 2021-143-E AND 2021-144-E

IN RE: Application of Duke Energy Progress, LLC)	SOUTH CAROLINA OFFICE OF REGULATORY STAFF'S RESPONSE IN OPPOSITION TO MOTION TO LIMIT ORS'S TESTIMONY
for Approval of Smart Saver Solar as Energy)	
Efficiency Program)	
Application of Duke Energy Carolinas, LLC)	
for Approval of Smart Saver Solar as Energy)	
Efficiency Program)	
_____)	

Pursuant to 10 S.C. Code Ann. Regs. 103-829(A) (2012) and other applicable law, the South Carolina Office of Regulatory Staff ("ORS") herein responds in opposition to the Motion¹ filed on October 7, 2021, by Duke Energy Carolinas, LLC ("DEC") and Duke Energy Progress, LLC ("DEP") (collectively, "Duke" or the "Companies") wherein Duke seeks to restrict ORS's ability to present testimony and evidence in the above-referenced proceedings. For the reasons set forth herein, ORS submits that the Companies' request is inappropriate, would unduly limit the Commission's ability to appropriately and fully consider the issues presented in this proceeding, is contrary to the vital public interests of openness and transparency, and, therefore, should be denied.

¹ The Companies' October 7, 2021, filing was stylized as a (I) Motion to Affirm Legal Standards; and (II) Response in Opposition to Motion for Summary Judgment and Motion Requesting Oral Argument.

ARGUMENT

On October 7, 2021, Duke filed with the Commission its request for an order “affirm[ing] established legal standards and limit[ing] the testimony and evidence offered at the hearing in these proceedings to that which is consistent with the applicable legal standards.” Motion at p. 1. Specifically, Duke purports to seek “affirmation from the Commission that the Program will be reviewed by the Commission under S.C. Code Ann. § 58-37-20 and the EE/DSM Mechanism” and “affirming that the limit of lost revenue recovery under Solar Choice is inapplicable to EE/DSM programs.” *Id.* at 8. Duke further requests that “the Commission instruct[] the parties to apply the [Utility Cost Test (“UCT”)] as the determinative test for determining program cost-effectiveness when evaluating the Program.” *Id.* at 9. In this manner, the Companies improperly seek to have the Commission restrict ORS’s ability to present only such testimony and evidence that conforms to the Companies’ selective interpretation of S.C. Code Ann. §§ 58-37-20 and 58-40-20 and prior Commission orders. The Motion therefore should be denied.

I. Whether the Programs are Subject to S.C. Code Ann. § 58-40-20

As an initial matter, much of Duke’s Motion is spent addressing matters relevant to ORS’s Motion for Summary Judgment and the Companies’ corresponding Response. Specifically, Duke asserts that the Programs are only subject to the provisions of S.C. Code Ann. § 58-37-20 as EE/DSM programs and that S.C. Code Ann. § 58-40-20 and its limitations on recovery of lost revenue are inapplicable to these proceedings. *See* Motion at 9-15. On October 14, 2021, ORS submitted its Reply to the Companies’ Response in which it addressed each of the issues raised by Duke in this regard. Accordingly, for the purposes of brevity and administrative economy and to the extent they may be relevant to the issues raised in Duke’s Motion, ORS incorporates herein by reference the countervailing arguments set forth in its Reply.

II. The Motion is Procedurally Improper

Turning to the substance of Duke's Motion, although styled as a "Motion to Affirm," it is in reality a petition seeking a declaratory order from the Commission as to the "applicability of any statute or of any rule or order of the Commission[.]" S.C. Code Ann. Regs. 103-825(2). *See, e.g.*, Motion at 8 ("The Companies ... seek affirmation from the Commission that the Program will be reviewed by the Commission under S.C. Code Ann. § 58-37-20 and the DSM Mechanisms."). Consequently, ORS is entitled to 30 days to file its Answer to Duke's request. S.C. Code Ann. Regs. 103-830.B.(2). Since the request was not filed until October 7, 2021, and the hearing in this matter is scheduled for October 28, 2021, Duke's request therefore should be rejected as untimely given that it seeks a declaration regarding the legal and procedural standards that should govern the hearing. Additionally, Duke's Petition should be rejected because it fails to comply with the content requirements of S.C. Code Ann. Regs. 103-825(2)(a) that the petitioner provide "[a] full disclosure of the petitioner's interest[.]" Given the far-reaching import of the requests in Duke's Petition, it therefore is proper for the Commission to reject Duke's petition to avoid substantial prejudice to ORS and to the fair and efficient administration of this proceeding, as well as to avoid making important policy revisions without the prerequisites for principled consideration.

III. Duke's Motion to Affirm Really is a Motion to Preclude Opposing Testimony

While Duke filed its Motion under the guise of intending only to affirm legal standards, in reality, the Motion seeks to preclude testimony from being proffered to the Commission except that which fits Duke's inappropriately narrow view of relevancy to this proceeding. According to Duke's Motion, only testimony proffered to the Commission that is viewed through the lens of

S.C. Code Ann. § 58-37-20 is relevant.² As a result, Duke's Motion seeks to inappropriately and preemptively establish all testimony that views the Programs through any other lens as irrelevant.

The ORS agrees that the rules of evidence should be followed in this proceeding,³ and the rules of evidence on relevance are clear. According to SCRE 402, "[a]ll relevant evidence is admissible, except as otherwise provided by the Constitution of the United States, the Constitution of the State of South Carolina, statutes, these rules, or by other rules promulgated by the Supreme Court of South Carolina. Evidence which is not relevant is not admissible." And according to SCRE 401, "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." While the Companies may not like the facts when viewed through a lens other than that of S.C. Code Ann. § 58-37-20, it has made no showing that viewing the Programs through another lens is irrelevant—or inappropriate.

Even if the Companies had made a showing that viewing the Programs through a lens other than that of S.C. Code Ann. § 58-37-20 was irrelevant, which they have not, the threshold to determine relevancy of evidence is low. *See Tennard v. Dretke*, 542 U.S. 274, 285 (2004) ("Once this low threshold for relevance is met..."). Because viewing these Programs through multiple lenses only helps to illuminate consequential facts for Commission consideration, it undeniably has passed the low relevancy threshold that exists. *See State v. Aleksey*, 343 S.C. 20, 35 538 S.E.2d 248, 256 (2000) ("The trial judge is given broad discretion in ruling on questions concerning the relevancy of evidence...."). In fact, granting the Motion to pre-emptively limit the

² See Motion, pp. 1, 2, and 8.

³ To be clear, the Commission also agrees to follow the South Carolina Rules of Evidence. S.C. Code Ann. Reg. § 103-846.

Commission's purview and ORS's ability to effectively and appropriately represent the public interest would be grossly prejudicial and constitute a clear abuse of discretion. Accordingly, Duke's Motion should be denied.

IV. Whether Duke's Combined Heat and Power ("CHP") and Load Curtailment Programs Support Duke's Request to Treat the Programs as EE/DSM

In support of its claim that the Programs should be considered EE/DSM programs, Duke attempts to draw an analogy to its CHP programs, which were approved by the Commission in Docket Nos. 2013-298-E and 2015-163-E. Motion at p. 11. Among other things, Duke suggests, because ORS did not oppose the Companies' CHP proposals, that somehow translates into an acknowledgment that the Programs under consideration here constitute EE/DSM and, therefore, are subject to the lost revenue recovery mechanisms of S.C. Code Ann. § 58-37-20. *Id.* The Companies also claim that the Programs are analogous to the Companies' DSM load curtailment programs and, therefore, should be approved as EE/DSM. *Id.* at 12.

First, it is important to note that the modifications Duke proposed in Docket Nos. 2013-298-E and 2015-163-E relating to CHP were offered well before the General Assembly passed Act 62 in 2019. *Compare* Motion at 4 ("The Governor signed Act 62 into law on May 16, 2019) *with* Duke's Letters dated February 23, 2018 in Docket Nos. 2013-298-E and 2015-163-E (seeking Commission approval of the proposed CHP programs). Accordingly, at the time ORS elected not to object to these programs, Act 62 had not yet been enacted and, therefore, the limitations on offerings related to net energy metering programs had not yet been established.

Second, as discussed in the Surrebuttal Testimony of ORS Witness Brian Horii, the Companies' CHP programs are not remotely similar to Solar PV. Specifically, Witness Horii explains that CHP involves capturing waste heat from electrical generation processes and

converting it to useful thermal energy, thereby reducing the need to burn fossil fuels and increasing the overall efficiency of the Companies' generating system. Horii Surrebuttal at pp.6-7. It is this increase in efficiency, realized by putting to use exhaust heat that would otherwise be wasted, that makes it reasonable to include CHP as part of an EE program. And, the amount of the EE incentive is based on surpassing a minimum CHP system efficiency threshold and surpassing the prevailing efficiency of the Duke grid. By comparison, Solar PV does not increase the efficiency of energy usage but only displaces the energy purchased from the Companies and does nothing to increase the efficiency of any of the energy using devices or appliances in the home. Accordingly, Duke's attempt to draw an inference between its CHP programs and the Programs at issue in these matters is misplaced and erroneous.

Finally, as ORS discusses more fully in its Motion for Summary Judgment and Reply, Duke's argument ignores the fact that the Programs inexorably fall within the Solar Choice Metering ("Solar Choice") Program approved by this Commission pursuant to Commission Order No. 2021-390, which was issued pursuant to S.C. Code Ann. § 58-40-20. *See* ORS Motion for Summary Judgment at 3; Reply at 3. Unlike the CHP and Load Curtailment offerings, in order to participate in the Companies' Programs, customers *must* be a Solar Choice Metering customer and must comply with all installation and interconnection requirements of the Residential Solar Choice Rider, which the Companies represent provides the foundation for net metering.⁴ Because the CHP programs and the Load Curtailment programs are unrelated to the Solar Choice tariff, they are

⁴ *See* Direct Testimony of Lynda Shafer, p. 4, ll. 21-22, p. 5, ll. 1-3; Application of DEP, p. 1; Application of DEC p. 1.

irrelevant to the determination of whether Solar Choice net energy metering is governed in part by S.C. Code Ann. § 58-40-20.

V. Whether the UCT Cost-Effectiveness Test is Determinative for All EE/DSM Programs

Duke further seeks to prevent ORS from offering testimony and evidence regarding the Programs' effectiveness when considered under the Total Resource Cost ("TRC") test, asserting that "South Carolina law makes clear that the determinative cost test is only the UCT." Motion at 16. Putting aside that Duke cites to no statutory or judicial case law supporting its claim that such a test is "South Carolina law," the Companies' argument in this regard is simply wrong. Duke suggests that the Commission has recognized that only the UCT is the appropriate test to be considered when analyzing a program's effectiveness stating that the "UCT was reaffirmed by the Commission in the Companies'" IRP proceedings. *See* Motion at p. 16. As discussed by Witness Horii in his surrebuttal testimony, however, the Commission has explicitly recognized the value of multiple cost-effectiveness test perspectives and did not foreclose the review of other cost-effectiveness tests for EE/DSM. *See* Order No. 2021-33 (agreeing with Duke's proposal to change from the TRC to the UCT "as the **primary** cost-benefit screen," but also recognizing that Duke "will continue to provide the results of all four of the cost effectiveness tests, as it always has in the review of programs.") (emphasis added);⁵ *see also, e.g.*, Order No. 2021-230 at 2 (providing results of multiple cost-effectiveness tests); Order No. 2020-831 at 4 (same); Order No. 2021-569

⁵ Apparently, Duke has abandoned the practice it represented to the Commission it would continue to undertake inasmuch as the Companies failed to provide the results of any of the four cost-effectiveness tests as part of its Application or supporting testimony.

at 51 (stating that “in this and future proceedings, the use of a variety of relevant cost-benefit tests may be considered and appropriately weighed by the Commission in its discretion.”).

Indeed, in response to ORS discovery, Duke conceded that “the Commission has not approved a DSM/EE program with an estimated TRC of less than 1, with the exception of programs for low-income customers or which are explicitly deemed by the Commission to be for societal good.”⁶ Because the Companies themselves have recognized the value of considering all four cost-effectiveness tests when evaluating proposed EE/DSM programs, it therefore strains credulity why preventing the Commission from considering this information when deciding whether to require Duke’s customers to bear additional costs is warranted or in the public interest. Duke’s opportunistic request that the Commission “instruct[] the parties to utilize the UCT test as determinative for all EE/DSM programs” represents a severe overreach beyond the appropriate scope of this proceeding that is inconsistent with reasoned, deliberate regulatory policymaking and the Commission’s own longstanding policy to consider multiple cost-effectiveness perspectives in the EE/DSM context where those perspectives are instructive. Consequently, it is proper to reject the Companies’ request for an order affirming that the UCT test is the only cost-effectiveness test that should be presented by the parties for the Commission’s consideration in this matter.

VI. Whether ORS should be Limited in its Ability to Offer Testimony and Evidence

This is now the second time in this proceeding that Duke has made aggressive efforts to limit ORS’s ability to offer meaningful and important testimony and evidence regarding the Programs at issue in this proceeding. First, Duke sought to substantially abbreviate the pre-filed testimony schedule in this matter by filing its August 13, 2021, motion to amend the procedural

⁶ DEP and DEC Responses to ORS AIR 1-8.

schedule, which motion the Commission ultimately denied. Now, it again seeks to inappropriately stifle robust discussion about the Programs' merits and whether it is appropriate for the Companies to recover from its customers lost revenues related to the Programs, notwithstanding the clear prohibitions of S.C. Code Ann. § 58-40-20(I).

However, doing so would restrict the Commission's ability to fully consider whether the Programs are in the public interest and in the interest of Duke's customers. It also would limit the depth of analysis necessary for a reasoned decision as to whether the Programs are properly characterized as EE/DSM programs or are indistinguishable as Solar Choice programs. Granting Duke's Motion further would diminish the transparency of these proceedings and leave customers and other interested persons in the dark about the impact these Programs may have on rates and service in the Companies' service territories. ORS therefore submits that the Commission should reject Duke's attempt to constrain full and open discussion regarding the legal requirements governing the Programs and the impacts that will result if they are approved.

CONCLUSION

WHEREFORE, for the above-stated reasons and for such other reasons and arguments that may be presented at any oral argument related to Duke's Motion, ORS respectfully requests that the Commission deny the Companies' Motion to Affirm Legal Standards and to grant such other relief as is just and proper.

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